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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD and LARRY J. BROUSSARD,

Petitioners

VERSUS

VERMILION CORPORATION

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT OF THE STATE OF LOUISIANA

BRIEF FOR THE NATIONAL AUDUBON SOCIETY AS AMICUS CURIAE

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I. QUESTION PRESENTED

The basic issue in this case is whether State trespass laws may be used to prevent trespasses on artificial canals constructed with private funds on private lands.

II. INTEREST OF AMICUS CURIAE

The National Audubon Society is a non-profit Educational and Scientific organization composed of 388,000 members from all fifty states. One of it's purposes is to encourage and promote the conservation of wildlife and to that end it operates

over sixty sanctuaries and nature centers from coast to coast.

One of the oldest and by far the largest of Audubon's sanctuaries is the Paul J. Rainey Wildlife Sanctuary in Vermillion Parish, Louisiana, adjacent to the lands of the respondent, Vermilion Corporation.

Audubon has been bothered by poachers and trespassers in the past and has obtained injunctions in Louisiana courts by using the procedure now being followed by Vermilion Corporation. See, *National Audubon Society vs. White*, 302 So.2d 660, (La. App. 3d Cir. 1974), writs denied 305 So.2d 542.

Audubon's canal system interconnects with Vermilion's eastern canal system, and thus for the reasons set forth in *Audubon vs. White, supra*, Audubon has an interest in the present case. An adverse holding herein will remove the protection afforded Audubon's sanctuary by the ruling in *Audubon vs. White.* 1/

Since the Rainey Sanctuary consists of marshland, the only practical means of surface transportation on the Sanctuary is by boat. Consequently over the years a network of canals has been excavated for access and to promote nature conservancy.

1/ **The Rainey Sanctuary comprises 26,000 acres of marshland. It was donated to the National Audubon Society in 1924 by Mrs. Grace Rogers Rainey. A condition of the donation was that Audubon "shall use the said land in perpetuity as a 'sanctuary for wildlife' and primarily for wild birds;". An account of the operation of the Rainey Sanctuary and many of the concerns which will be voiced in this brief may be found in greater detail in the Society's magazine, "*Audubon*", July, 1978, Page 18, "Land of the Snow Geese, Three Corner Grass - and Lonnie Lege" by Schueler.**

Canal excavation commenced with Audubon's predecessor, E.A. McIlhenny, who in 1912 excavated the north/south canal which bears his name. *Audubon vs. White, supra.* This canal was the subject of the litigation with the Whites and also was the canal in question in *(Mc) Ilhenny vs. Broussard*, 172 La. 895, 135 So. 669 (La. 1931).

The McIlhenny Canal is eighty feet wide by about 10 miles in length. There are fourteen additional miles of eighty foot canal on the Sanctuary.

Audubon or its assignees have also dredged 17.5 miles of forty foot canal, 3 miles of ten foot canal, and 2 miles of twenty-five foot canal.

In addition to these main canals, Audubon has approximately twenty-five miles of pirogue trails and mud boat ditches which measure four feet wide, more or less.

Thus, on Audubon's 26,000 acre sanctuary, there are more than 70 miles of internal canals.

Audubon's sanctuary is a relatively small part of the extensive sanctuary and game preserve system which blankets the west half of Louisiana's vast coastal marshes. Beginning on the east with 80,000 acre Marsh Island, also called Russell Sage Wildlife Refuge, then traversing west to Louisiana's 15,000 acre State Wildlife Refuge, thence to Audubon's own 26,000 acre Rainey Sanctuary and continuing westerly to the enormous Rockefeller Refuge and Game Preserve of 80,000 acres, on to the 35,000 acre Lacassine National Wildlife Refuge, and finally to the largest of all, Sabine National Wildlife Refuge comprising 140,000 acres, it becomes apparent that to the good fortune of the Americna people, a substantial portion of Louisiana's marshland has been preserved as a haven for wildlife.

Additionally, there are many owners of larger portions

of marshland, such as Vermilion Corporation, who carefully control hunting and trapping on lands in these same areas to the extent that their acreage must be considered to be wildlife management areas.

Each of these major sanctuaries and private land ownerships also have extensive internal canal systems similar to those of Audubon and Vermilion. Though these may, by chance, connect up with one another at given points or with naturally navigable waters, for the most part they serve only the inner areas of the refuges or the lands of the private land owners.

In ***White, supra,*** the Louisiana Court of Appeal for the Third Circuit accepted Audubon's argument that:

> "... a wildlife sanctuary cannot be operated successfully if the general public is permitted to use the canal, and that for that reason, they have constantly limited the use of it to persons who they felt had legitimate business interests which justified the issuance of permits to them."

Audubon still maintains that same argument as to the Rainey Sanctuary and, because of Audubon's wide interest in nature conservancy, it urges the same argument as to the many other wildlife sanctuaries and privately owned game preserves spread westerly along Louisiana's south coast from Cote Blanche Bay to the Sabine. Together they constitute the greatest wintering ground for water fowl in North America.

III. ARGUMENT

A. There is a Compelling State Interest Which Mandates that Louisiana Control the Regulation of its Private Canals. There is No Offsetting or Compelling Federal Interest in Control of the Canals, and Imposition of a Federal Navigation Servitude Would be Contrary to the Tenth Amendment.

This Honorable Court held, in ***National League of Cities v. Usery***, 426 U.S. 833, 842, 96 S. Ct. 2465, 2470, 49 L.Ed. 2d 245 (1976), citing other authorities:

> "While the Tenth Amendment has been characterized as a 'truism', stating merely that 'all is retained which has not been surrendered,' ***United States v. Darby***, 312 U.S. 100, 124, 61 S. Ct. 451, 462, 85 L.Ed. 609 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."

Usery mandated recognition of certain powers reserved to the states. In the same vein, in ***Oregon, ex rel. State Land Board vs. Corvallis Sand & Gravel Company,*** 429 U.S. 363, 378, 97 S. Ct. 582, 591, 50 L.Ed.2d 550 (1977), this Court held:

> "Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. 'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.' ***Davies warehouse Co. v. Bowles,*** 321 U.S. 144, 155, 64 S. Ct. 474, 480, 88 L.Ed. 635 (1944). This is particularly true with respect to real property, for even when federal common law was in its heyday under the teachings of ***Swift v. Tyson,*** 16 Pet. 1, 10 L.Ed 865 (1842), an exception was carved out for the local law of real property. ***Id.***, at 18. See, ***United States v. Little Lake Misere Land Co.***, 412 U.S. 580, 591, 93 S.Ct. 2389, 2396, 37 L.Ed. 2d 187 (1973)."

Corvallis, a case involving the bottom of a natural waterway, recognized that state laws should govern property ownership.

If state law must be applied in cases involving water bottoms, and if the states have retained, through the Tenth Amendment, the power to define the rights of property owners in relation to other private parties, then it follows that the issuance of an injunction by a state court is proper when needed to protect a property right arising from lands which were formerly fast lands, though now affected by an owner-constructed canal.

If Louisiana, with its vast marshes, is to function effectively in a federal system in which other states don't have the problem of regulating the use of private canals to nearly the degree that Louisiana does, then Louisiana's right to prohibit trespass on private canals should be maintained.

What compelling federal interest has been advanced in this case? Three individuals undertook for a short period of time to fish for shrimp in a canal system which was clearly marked as private (by more than 400 signs), despite receiving numerous notices that they were trespassing and poaching in an area where they did not have permission to intrude.

Their actions took place four years ago, but they still stand alone, isolated examples of willful trespass in private canals.

In the companion case being considered, ***United States vs. Kaiser-Aetna***, 408 F. Supp. 42 (Haw. 1977), aff., 584 F.2d 378 (9th Cir. 1978), the only federal interest arises from a government agency's bootstrap attempt to expand its jurisdiction. As a former Secretary of the Army this writer is aware of this proclivity. It is no more the stuff from which a compelling federal interest can be deduced than is the isolated action of three trespassers in Louisiana.

By contrast, Louisiana's compelling state interest arises

arises from its unique topography. 2/ The entire lower tier of the state, from Mississippi to Texas, is marshland. Much of this marshland is subject to private ownership or, as stated previously, to control by state and private wildlife organizations such as Audubon.

It is patently in Louisiana's interest to regulate property rights in its unique marshland, and while there are numerous public waterways crossing these marshlands, such as the Intracoastal Waterway running east and west across the entire state, and numerous north/south public waterways such as the Freshwater Bayou Canal in question in the present case, it is clearly in Louisiana's interest to provide its citizens with protection for their internal communications systems, whether these systems consist of private roads on highlands or private canals in marshlands.

Reverting for the moment to the question of imposing the navigation servitude on these privately constructed canals, the early Louisiana canal case, ***Harvey v. Potter***, 19 La. Ann. 264 (1867), in upholding the private right of Harvey to his canal stated:

> "The right of expropriation, it is true, belongs to the public, and the land and canal so constructed upon it, might under Constitutional and legal provisions, become public property, and be appropriated to public use. ***But where no public need exists for such conversion,*** and the private property in its entirety is subjected to private ownership, it would seem that the proprietor

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2/ As late as 1945, New Orleans had more miles of canal than Venice. Congress recognized very early the need for canals, reserving New Orleans' greatest landmark, Canal Street, as a site for a canal to be operated by a state chartered private corporation. Ironically, this canal was never built. See, Acts of Congress, March 3, 1807; U.S. Statutes at large, Vol. 2, Page 440, Section 3.

has the right, in any manner he deems best, to render that property most productive . . ."
(Emphasis Added)

In this present case, where is the public need for conversion of Vermilion Corporation's canals to public use? Vermilion's canals had never before been used for shrimping. Its canals, as are Audubon's canals, are dead-end canals for the most part, providing access to oil and gas drill sites.

In Audubon's case as in Vermilion's case, the only parties who come into the canal systems maintained by these two property owners are parties who have business with these property owners. In Vermilion's case, these are hunters and trappers, in addition to the oil company land owner. In Audubon's case, these are naturalists, ornithologists and botanists, in addition to mineral lessees and others. Nevertheless, the principle is the same and poaching will do great harm to the primary interests of both of these property owners.

Louisiana's present system works. It has accomplished Louisiana's purposes for over a century. There's no compelling reason to change it.

Over fifty years ago, this Honorable Court decided a Louisiana case which demonstrates the correct procedure for condemning private canals to allow public use when there is public need. In *Hanson Lumber Co. vs. United States*, 261 U.S. 581, 67 L.Ed. 809, 43 S. Ct. 442 (1923), this Honorable Court was dealing with a privately owned canal which had been deemed essential to the completion of the Intracoastal Canal.

The Secretary of War utilized Congressional acts which conferred on him the power to condemn land and other property needed for the construction, including specifically the Hanson canal. The refusal of the canal owner to sell the Hanson canal to the Secretary of War caused a five year delay in the

completion of the canal, from 1918 to 1923. See, "Report of the Chief of Engineers, U.S. Army", 1918-1924 inclusive, section entitled "Intracoastal Waterway, Franklin to Mermentau, Louisiana."

In *Hanson, supra*, this Honorable Court affirmed the power of the Secretary of War to condemn the Hanson canal and affirmed an award of $65,000.00 for the taking. The arguments now being advanced to justify the right of the Corps to take a privately owned canal for use by the public without compensation or determination of necessity weren't raised in *Hanson*.

Hanson illustrates the proper condemnation and compensation procedures, coupled with Congressional mandate, which should be followed in order to transform a private canal into a public one.

B. The National Audubon Society and Its Neighbor, Respondent Vermilion Corporation, Occupy Adjacent, Similar Marshlands. Discarding Louisiana's Well Established Right of Private Control Over Private Canals will have Equally Disastrous Consequences for Both.

Being the eastern neighbor of Respondent Vermilion Corporation, and having access to the records of its predecessor, McIlhenny, Audubon is in an advantageous position to compare its situation to Vermilion's situation in the present litigation. As a party plaintiff in both the *Ilhenny* and *White* cases, Audubon has experienced the problems faced by Vermilion in the present litigation.

For the Court's clearer understanding, Audubon likens the canal system in question here to the fingers of a hand spreading westerly from a wrist anchored to the Freshwater Bayou Canal on the east. A sole artery at the eastern, wrist end of this hand constitutes the only connection with a public waterway, the Freshwater Bayou Canal. The fingers spread out generally

westerly to dead-ends which were drill sites or now serve as mineral production locations. There are much smaller arteries which are the trappers' canals and pirogue trails, excavated much earlier. This hand doesn't reach the Gulf to the south, nor the Intracoastal Waterway to the north. It's a self-contained system, and it was within this system that the petitioners were apprehended on numerous occasions while shrimping in Vermilion's canals.

On the east side of the Freshwater Bayou Canal, there is a similar hand-shaped canal system, running easterly, to which Audubon's system interconnects at two points.

The point of the hand analogy is that the fingers of the system are dead-ends. The system is not an open ended, connecting commercial conduit. It serves Vermilion's lands only. Rainey, likewise, has no connection with the Gulf of Mexico except through other waterways.

Just as a contention was made in 1931 in the *Ilhenny* case that Audubon and McIlhenny's canal was taking water from a natural channel and thus causing it to silt up, the petitioners in this case are belatedly contending that Freshwater Bayou silted up because of Vermilion's canal system.

In addition to the reasons given by the Louisiana courts in *Ilhenny* and in Vermilion's case by the Louisiana Third Circuit, Audubon respectfully points out to the Court that all questions concerning any possible effect on Freshwater Bayou by Vermilion's canal system were rendered moot by the action of the Corps of Engineers.

When Freshwater Bayou Canal was constructed by the Corps, it built a levee around the southernmost portion of Freshwater Bayou, from the point where it entered the Gulf for a distance of two miles northerly, and used this area to deposit spoil removed during the dredging of the new canal. This obliterated

the portion of Freshwater Bayou lying east of the Freshwater Bayou Canal.

On the west side of the Freshwater Bayou Canal, the Corps dammed the mouth of Freshwater Bayou at the point where it courses northwesterly from the canal, completely plugging it at the point where it would normally flow from Vermilion's marsh into the public canal.

Since the Corps of Engineers has effectively obliterated Freshwater Bayou, it serves no useful purpose to pursue the question of what effect Vermilion's canal system may or may not have had on Freshwater Bayou.

The brief of the Solicitor General makes much of the question of signs being posted on artificial canals so that the navigating public will understand that it has traversed from a public to a private canal. As Audubon established in the ***White*** case, the points at which its canal system connect to public navigable waters are marked by billboards, five feet by six feet in size, advising the public of the private nature of the canal. Vermilion Corporation's four hundred "No Trespassing" signs compare favorably in terms of commanding the attention of the public.

The report of ***Audubon vs. White, supra,*** establishes that Audubon has granted permits to the Corps of Engineers in the past to allow the Corps the use of Audubon's canals, just as Vermilion has done. The Corps has thus recognized both Audubon's and Vermilion's right to control access to their canals.

We now turn to the somewhat absurd result which will be reached if the Ninth Circuit's holding in ***Kaiser-Aetna*** is carried to its logical extreme with respect to the boat houses which belong to Vermilion and Audubon at their respective headquarters in the vicinity.

These boat houses are large, open-ended structures straddling canals. They resemble old-fashioned covered bridges, except that in lieu of a floor or bridge, their bottoms are a segment of the canals in question. In the case of Vermilion's boat shed, traffic may proceed up or down the canal from either end. The *Kaiser-Aetna* holding would open these boat houses to through traffic.

This calls to mind the Solicitor General's reference to *United States v. Causby*, 328 U.S. 256, 260-261 66 S. Ct. 1062, 90 L.Ed. 1206 (1946), in which this Honorable Court held that the navigable air space of the United States above Causby's chicken house was open to the aviating public. However, the Solicitor General mistakenly concluded that in *Causby* this Court held that the aviation servitude could be exercised without compensation being paid to the owner of the land. This was not the case. In *Causby*, the United States had to pay for Causby's chickens, lost because of noise from Air Force bombers. Similarly, in the present case the navigation servitude can't be invoked without proper determination and just compensation.

C. Audubon's Wardens Will Encounter Serious Problems if the Present Louisiana Private Canal Jurisprudence is Overturned.

Audubon has reviewed the briefs filed by the petitioners and the Solicitor General and has reviewed drafts of the briefs filed by the respondent, Vermilion, and several of the amici curiae. Audubon's concern differs somewhat from the concerns of the parties and other amici.

That is, Audubon purports to speak not only for itself, but in the interest of the wildlife on its Sanctuary and the adjoining sanctuaries. As an example of this concern, Audubon participated in a program whereby 1500 live alligators were transported from neighboring Marsh Island and the State Game Refuge to states in which alligators had become scarce.

Audubon approves and adopts by reference the briefs that the respondents and other amici curiae have submitted with respect to Fifth Fifth Amendment protection and the requirement of just compensation. However, compensation is not Audubon's sole concern.

Audubon's goal is to preserve this marsh and, where needed to return it to pristine condition.

There is no more marsh to be purchased in the event of an award of compensation, and if the marsh we have is lost, we will all be poorer.

Many of the pirogue trails and mud boat trails which extend into the marsh on the Rainey Sanctuary were excavated to allow shrimp and crab larvae to penetrate deep into the marsh for protection as they mature. These canals also provide access to Audubon's artificial canals and in turn to outside waters when the shrimp and crabs reach maturity. If, by improving the marsh for these propagation purposes, the marsh is opened and access is provided for poachers, what has been accomplished?

In *Audubon vs. White, supra*, the Louisiana Third Circuit misread the record when it found that Audubon has a staff of thirty wardens at the Rainey Sanctuary. Actually, Audubon's Sanctuary director testified that his entire staff, nationwide, totals thirty. The Rainey Sanctuary is patrolled by only two wardens. See, "Audubon", July, 1978, and the record in *Audubon vs. White, supra.*

In the *White* case, the Louisiana Third Circuit correctly found that these wardens manage to patrol this enormous refuge because they recognize on sight all boats which have a permit to use these canals. If the Rainey Sanctuary is suddenly opened to traffic by all comers, these two wardens can't possibly patrol approximately seventy miles of canals. Ef-

fective patrolling under these circumstances would require the construction of fences along the crests of the levees lining both banks of all the canals, plus many more wardens. Physically and economically, this is all but impossible.

The worst problem which Vermilion and Audubon would face in the event of an adverse decision is erosion. The banks of all of these canals are composed of organic matter and are highly vulnerable to wave action. Audubon requires that all boat operators proceeding on its canals reduce their speed to prevent erosion. If these landowners can't control the speed of boats using their canals, their game management programs will suffer.

In addition to causing erosion, wave action from speeding boats kills the young of the nesting native mottled duck population. These young water fowl and other species are vulnerable to wave action because they crowd against the canal bank and tend to be caught and drowned under successive waves.

As the article in "Audubon,"July, 1978, mentioned, Audubon is not only concerned with producing minerals in order to raise revenue for its sanctuaries. It is also anxious to set an example for the oil and gas industry and for South Louisiana landowners, demonstrating that oil development, if properly managed, is compatible with nature conservancy.

Audubon's mineral lease forms provide numerous safeguards for the sanctuary. If Audubon is deprived of the right to regulate the traffic passing through its canals, some of these safeguards will be useless since Audubon's canals will be open to use by all who choose to travel them, including irresponsible mineral operators.

The very limited amount of low-speed traffic allowed by Audubon at the present time still results in occasional alligator and fish kills due to boat propellors. With unlimited, high-speed traffic the threat to these species will increase.

Finally, Audubon is compelled to mention the butterfly net devices which were being used by the three peittioners. The butterfly net rig is a simple but effective mechanism which may be attached to small, lightweight, aluminum flatboats. The net frames consist of pipes forming the sides of an eight foot square. A frame is attached to each side of the flatboat by a hinge. Monofilament nets trail from the edges of the frames. After the boat is underway, the frames are lowered so that they are completely below the water and scoop up everything in their path.

These devices are so efficient at clearing all life from canals that the Vermilion Parish Police Jury, the governing body of the parish (county) in which the Rainey Sanctuary is located, on March 20, 1978, adopted a resolution recommending "to the legislative delegation of Vermilion Parish to support legislation that would outlaw the use of butterfly nets in Southwest Pass and throughout Vermilion Parish."

IV. CONCLUSION

There is no compelling reason to impose the navigation servitude in this case. Federal law does not clearly require it and state law clearly mandates against it.

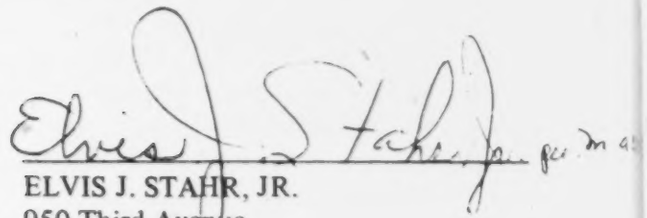
The Louisiana rule has functioned well for Louisiana's unique situation for over 100 years. Since ***Harvey v. Potter, supra,*** the only parties who have complained of the Louisiana rule have been six trespassers, i.e., the three petitioners, the two Whites, and Joseph Broussard in the ***Ilhenny*** case.

On the other hand, the National Audubon Society's Rainey Sanctuary and the numerous other wildlife sanctuaries and game management preserves along Louisiana's southwest coast have been able to serve their functions for the benefit of wildlife and the public as a whole for many decades without substantial interference from poachers or trespassers. An

unneeded change in the jurisprudence would disrupt this.

The National Audubon Society submits that the decision of the Louisiana Third Circuit Court of Appeal is proper and correct as a matter of Louisiana law, as a matter of federal law and as a matter of public policy. It is respectfully requested that this decision be maintained by this Honorable Court.

Respectfully submitted,



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